n: joanhol@law.berkeley.edu on behalf of Joan Heifetz Hollinger [joanhol@law.berkeley.edu]
t: Monday, December 15, 2003 7:16 PM
To: adoptionregs@state.gov
Subject: State/AR-01/96 - Comments on Proposed 22 CFR Part 96

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Attached to this note is a "merged" copy of the two files I submitted earlier today. Harcopies of those two files and of this merged file were sent today to the Adoption Regulations Docket Room CA/OCS/PRI via overnight fedex letter.

Thank you, Joan Heifetz Hollinger

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December 15, 2003

U.S. Department of State
CA/OCS/PRI
Adoption Regulations Docket
Room SA-29
2201 C Street, NW
Washington, DC 20520

RE: Docket Number State/AR-01/96

Dear Sir or Madam:

[this file combines the two files sent earlier today...hard copies have been sent via fedex tracking number 8402 5776 4364]

Thank you for the opportunity to submit comments on the proposed regulations published in the Federal Register, September 15, 2003 at pages 54064-54122 to implement the Intercountry Adoption Act of 2000, 42 U.S.C. Sec. 14901-14954 (IAA) and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

I congratulate the Department for its heroic effort to draft proposed regulations that are consistent with the principles and goals of the Convention and the IAA while also being responsive to the concerns of many different kinds of service providers, adoptive parents, adopted individuals, birth parents, and various immigration, international, child welfare and adoption law experts. The combination of fiscal and structural requirements with performance-based standards for accrediting agencies or approving persons to provide adoption services in Convention adoptions is, on the whole, excellent. I especially admire the requirements for insurance coverage and the prohibition against blanket waivers of liability for negligence or intentional wrongdoing, as well as the proposal for a "primary provider" to be responsible for coordinating the services required for each adoption and to be legally liable for the actions of its supervised providers in the United States or other Convention countries. For the most part, the regulations are written in a clear, straightforward style and the Preamble offers cogent explanations of why the Department chose to resolve some controversial issues of statutory interpretation and policy one way rather than another.

I have a number of specific concerns and suggestions that are intended to clarify some ambiguities in the proposed regulations and to enhance the likelihood that the procedures for accrediting or approving adoption service providers will result in a system that genuinely protects children and their birth and adoptive families.

Comments on the Definitions in Subpart A, Sec. 96.2 of the proposed regulations.

First, I propose the following clarification of the definition of "adoption" for purposes of the IAA:

"For purposes of the Intercountry Adoption Act of 2000 (IAA), adoption means the judicial or administrative procedure that establishes a legal parent-child relationship for all purposes between a minor and an adult who is not already the minor's legal parent and that satisfies the requirements for the minor child's

(a) immigration to the United States under the Immigration and Naturalization Act (INA), 8 U.S.C. Sec. 1101(b)(1)(E), (F), and (G); 1151(b)(2)(A)(1), [and any other relevant INA provision], or
(b) emigration from the United States under the IAA, 42 U.S.C. Sec. 14932 [and any other relevant IAA or INA provisions]."

ALTERNATIVELY, the definition could be:

"For purposes of the Intercountry Adoption Act of 2000 (IAA), adoption means the judicial or administrative procedure that establishes a legal parent-child relationship for all purposes between a minor and an adult who is not already the minor's legal parent and that satisfies the requirements of the IAA for recognition of the adoption in the United States, 42 U.S.C. Sec. 14931, 14951 or the requirements of the IAA for the minor's emigration to another Convention country, 42 U.S.C. Sec. 14932."

The suggested alternative definitions of "adoption" are proposed for the following reasons:

1. There is no federal law definition of adoption. Neither the Hague Convention nor the IAA define "adoption." Instead, they each refer to the kinds of adoption that are covered by the Convention –"only adoptions which create a permanent parent-child relationship," Art. 2-- and that are entitled to recognition and full effect in the United States under the IAA, 42 U.S. C. Sec. 14931, 14951. The implementing regulations should be consistent with the references to the kinds of adoption that are subject to the Convention and the IAA. The regulations should not create the misleading impression that there is a federal definition of adoption or that this definition is the only kind of adoption legally recognizable in the United States.
2. The creation of the status of parent and child between individuals who are not each other's biological parent or child is historically and constitutionally within the authority of State governments, and more specifically, within the authority of state courts. Similarly, State law remains the primary source for determining the legal and economic consequences of an adoption. Given the

IAA's specific provision disfavoring preemption of State law, 8 U.S. C. Sec. 14953, and the Department's eagerness to defer to State law except to the extent necessary to implement Convention and IAA provisions, it is important to connect the definition of "adoption" to the specific context of Convention and IAA provisions.

3. The definition of "adoption" should be specifically connected to the requirements for immigration, emigration, and recognition in this and other Convention countries in order to avoid the misleading impression that adoption always requires the termination of the minor child's relationship to any former parent. In the United States, for example, perhaps as many as 40-50% of all adoptions are stepparent adoptions in which the child's existing custodial parent retains parental rights while the adopting stepparent becomes the child's second parent. In states that have enacted a version of the Uniform Probate Code, children adopted by stepparents can inherit from both of their "former" parents as well as from their adoptive stepparent. Perhaps half or more states allow other kinds of second parent adoption in which one legal parent retains parental rights and obligations when a child acquires a second parent through adoption. Moreover, more than half the states now recognize various forms of "open" adoption which terminate an original parent's rights and duties but nonetheless allow enforceable agreements for post-adoption contact between an original parent and a child adopted into another family.
4. The Department's proposed definition of "adoption" refers to the "formal act" that establishes the adoptive parent-child relationship. This is too vague and potentially encompasses a private "formal" declaration of an adoption without any administrative or judicial oversight, something not contemplated by the Convention or the IAA. It is preferable to indicate that for purposes of the Convention and the IAA, the adoption has to be granted through an administrative or judicial procedure or process.
5. By more carefully defining adoption in relation to the specific provisions of the Convention and the IAA that affect immigration, emigration, and recognition, the regulations can accommodate future modifications of those provisions. For example, the IAA authorizes the Secretary of State to establish procedures for the adoption of children by individuals related to them "by blood, marriage, or adoption," 42 U.S.C. Sec. 14952. The characteristics of such adoptions may or may not "fit" the Department's proposed definition of adoption, but would fit within either or both of my suggested definitions.

Second, the definition of "Convention adoption" may be too narrow. As the preamble indicates, p. 54075, the Convention and the IAA have differently worded provisions for what constitutes a "Convention adoption." The Department has proposed a rule that would limit the IAA provisions to adoptions in which "the child has moved or will move from one Convention country to another," p. 54094. Under this formulation, the IAA would presumably not apply to adoptions of a child residing in another Convention country by a U.S. citizen who does not intend to move the child to the U.S.

or to another Convention country. How is that intention to be manifest? Will it be a durational test -- e.g. an intention to move promptly or within 90 days or within six months? Or will it be an intention to move before the child is twenty-one years of age? What about a U.S. citizen who originally intends to reside for an indefinite period of time in the child's country of origin, but whose employer transfers him or her back to the U.S., or who otherwise decides to move to the U.S.? Would the validity of the adoption for purposes of the child's immigration to the U.S. suddenly be called into question if the IAA provisions had not been followed?

If the IAA protections for children and their birth and adoptive families are greater than the protections currently available in other circumstances in which a U.S. citizen adopts a child residing in another country, why should they not be extended to cases in which the U.S. citizen adoptive parent does not plan on an immediate move to the U.S.? If the U.S. citizen wants to ensure that the adoption of the foreign-born child will be entitled at some point in the child's life to full and complete recognition in the U.S., it would be advantageous to have the foreign adoption completed subject to IAA procedures and standards. The Convention does not bar the United States from offering greater protections or from protecting adoptive families that do not immediately move from one Convention country to another. Unless there are specific and adverse reasons for limiting the scope of the IAA definition of "Convention adoption," I would favor tracking the statutory language in the 42 U.S. C. Sec. 14902(10).

Third, there are several other definitions that should be clarified. For example, it would be helpful to have some examples of what "monitoring a case" means as one of the six statutory adoption services and how specifically it differs from the exempted "child welfare services." Does monitoring entail arranging for child welfare services post-placement –see adoption service (6) or is it limited to overseeing the legal steps that have to be completed for an adoption to become final? Does monitoring require that the adoption service provider have legal custody of the child or can legal custody be granted to the prospective adoptive parent(s) or remain with a public body in this or another Convention country? Are providers of child welfare services exempt from the accreditation or approval standards only if they do not assume custody of the child? Should the definition of child welfare services include services in cases of dissolution as well as disruption? Is this a reference to legal or physical custody or to both? I am not proposing answers to these questions, but am requesting that the Department come up with more specific examples of the distinction between "monitoring" and providing "child welfare services."

In the interests of making a timely submission of my comments, I am transmitting these comments on the proposed definitions now and will submit additional comments later today. My interest in the proposed regulations arises from my academic and policy work on adoption laws and practices, as manifest in my service as Reporter for the proposed Uniform Adoption Act promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1994 and approved by the American Bar Association House of Delgates in 1995, my research and writing as principal author and editor of Adoption Law and Practice 3 vol. (Matthew Bender Co.

Lexis-Nexis, 1988-2003), my teaching of adoption, child welfare, and family law, and my role as an advocate for children's interests in contested adoption and custody cases. I have never had any financial interest in any entity that provides adoption-related services and I am not a member of the board of directors or a trustee of any organization that is currently involved in intercountry adoptions. My primary interest is to promote adoptions both in this and other countries that serve the interests of children in having permanent families and that are the result of procedures that ensure due process to birth and adoptive parents.

COMMENTS, continued...

In addition to the comments I submitted earlier today, I want to indicate my complete agreement with most of the concerns expressed by the American Adoption Congress, Childrens Rights, Inc., and the Evan B. Donaldson Adoption Institute with respect to the proposed "substantial compliance" rule for accrediting or approving adoption service providers. While a substantial compliance approach may be appropriate for evaluating compliance with some of the specific standards set forth in Subpart F—for example, those that require the prospective implementation of statutorily required procedures—nothing short of full or strict compliance is necessary for many of the standards. For example, there cannot be substantial compliance with the requirement that an agency seeking accreditation be a private nonprofit organization licensed to provide adoption services in at least one State. An agency that does not satisfy this requirement cannot and should not be accredited. Nor can there be anything short of strict compliance with the sensible and essential requirement that the agency have in force adequate liability insurance for professional negligence. Nor can there be anything short of strict compliance with the "specific requirements" listed in 42 U.S.C. Sec. 14923(b)(1)(A). It is only with respect to subsections (b)(1)(B)(C) or (D) that a substantial compliance standard with room for improvement should be considered. These latter requirements can be satisfied in different ways and depend to some extent on the availability of certain kinds of personnel and of M.S.W. and other educational programs in intercountry adoption, which, to my knowledge, are not offered at this time by most, if any, schools of social work in this country.

In lieu of repeating here the detailed comments on the substantial compliance rule you will be receiving from the organizations I've referenced above, I strongly recommend that you take them seriously and consider a more careful distinction between the standards that must be fully satisfied for purposes of accreditation or approval and those for which substantial compliance with a plan for improvement are appropriate.

I also agree with the detailed comments of the American Adoption Congress with respect to Sec. 96.39(d) of the proposed regulations. Clarification of what is meant by a "blanket waiver" would serve to allay the concerns expressed by many adoption service providers that the regulations are imposing "strict liability" on them. Because neither the

IAA nor the regulations are imposing strict liability but are barring providers from shielding themselves against liability for their own and their supervised providers' negligence or intentional wrongdoing, it is important for the regulations to spell out in some detail the kinds of waivers that are unacceptable and to give some examples of waivers that may be acceptable.

I have some concerns about the proposed standards for cases in which a child is emigrating from the United States for purposes of being adopted by a resident of another Convention country. My concerns are somewhat different than those expressed by the American Adoption Congress and others who have submitted comments to the Department. The proposed standards for accredited agencies or approved persons who provide services for the adoption of an "outbound" child include some substantive placement standards in Sec. 96.54 that are not in the IAA. Where, for example, does the "significant weight" to the placement preferences of the birth parent come from? Should this be subject to State laws on deference to birth parent preferences in making an adoption placement? I actually support a rule that would give priority to a birth parent's preferences in voluntary relinquishments, but I am not aware that such a rule exists in federal law and I do not understand where the Department thinks the authority for this rule comes from. Also puzzling is the "diligent effort to place siblings together...." Where does that come from? Unlike the federal ICWA, which includes specific placement preferences for children who are "Indian children" under ICWA, neither the IAA nor the Convention contains any substantive placement preferences for "outbound" children. I question the Department's authority to create or impose such preferences. The preamble discusses the importance of deferring to state laws unless specifically preempted by the IAA or the Convention. The definitions sections defer to state law definitions of "best interests."

The Department should not spell out the meaning of best interests unless specifically authorized to do so by federal law. The proposed accreditation/approval standards for outbound adopted children should adhere more closely to the language of the IAA. The still-to-be promulgated regulations governing the actual procedures for completing an inbound or outbound Convention adoption can address the factors a State court must consider in determining whether a proposed outbound adoption is appropriate for a particular child. The accreditation\approval standards should not give the misleading impression that it will be an accredited agency or an approved person who will decide the fate of outbound children –this will be done by State courts.

While favoring a more modest approach in these regulations to the standards for providing services in adoptions for outbound children, I nonetheless strongly favor a requirement in Sec. 96.53 that any consent by a birth parent, or any other person whose consent to the adoption is required, contain a specific acknowledgment of, and consent to, the child's adoption by a resident of another named Convention country and the proposed move of the child to that country.

I agree with the recommendation of the American Adoption Congress with respect to Sec. 96.49(k). The minimum time for prospective adoptive parents to consider a referral of an adoptable child should be two weeks.

Once again, thank you for the opportunity to submit these comments.

Sincerely,

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From: joanhol@law.berkeley.edu on behalf of Joan Heifetz Hollinger [joanhol@law.berkeley.edu]
Sent: Monday, December 15, 2003 5:10 PM
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